Supreme Court, U.S.
FILED
MAY 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1513

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1988

ALFRED P. CHRISTOFFERSEN, et al.,

Petitioners,

vs.

MAJOR GENERAL ROBERT J. COLLINS, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

KENNETH O. EIKENBERRY
Attorney General

JAMES M. JOHNSON
Sr. Assistant Attorney General

JOHN J. RYAN
Assistant Attorney General

Highways-Licenses Building
Seventh Floor
Olympia, Washington 98504
Attorneys for Respondents.

STATE PRINTING PLANT OLYMPIA, WASHINGTON

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in applying the military non-intervention doctrine and analysis under *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971) to deny petitioners 42 U.S.C. § 1983 claims?

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE CASE	1
ARGUMENT	1
A. INTRODUCTION	1
B. THE RULING OF THE COURT BELOW IS NOT IN CONFLICT WITH DECISIONS OF ANY OTHER FEDERAL COURT	2
1. *Bollen v. National Guard Board, 449 F. Supp. 343 (W.D. Pa. 1973) Is Not in Conflict With the Ruling of the Court Below*	2
2. *The Prior Court of Claims Ruling in the Instant Controversy Is Not in Conflict With the Decision of the Court Below*	3
3. *Sebra v. Neville, 801 F.2d 1135 (9th Cir. 1986) Does Not Support a Finding of Conflict Among the Lower Courts*	4
4. *Contrary to Petitioners' Assertions, the Integrity of the National Guard Technician Program Is Not at Risk*	5
CONCLUSION	6

TABLE OF AUTHORITIES

Cases

Bollen v. National Guard Board, 449 F. Supp. 343 (W.D. Pa. 1973)	2, 3
McAdams v. Madagorda Co. Appraisal Dist., 798 F.2d 842 (5th Cir. 1986)	3
Penagaricano v. Llenza, 747 F.2d 55 (1st Cir. 1984)	4
Sebra v. Neville, 801 F.2d 1135 (9th Cir. 1986)	4, 5
Tennessee v. Dunlap, 426 U.S. 312 (1976)	2

Statutes

10 U.S.C. § 1552	4
28 U.S.C. § 1491	3

Regulations

ANGR 36-05	2

No. 88-1513

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1988

ALFRED P. CHRISTOFFERSEN, et al.,

Petitioners,

vs.

MAJOR GENERAL ROBERT J. COLLINS, et al.

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

Facts of the case are fully set forth and fairly presented in the opinion of the court below. (Pet., App. 3, pp. 25-30.)

ARGUMENT

A. INTRODUCTION

What is presented in this case is an attempt by petitioners to cloak military personnel matters with the full panoply of constitutional protections and rights which, although arguably applicable in a civilian context, have been uniformly found inapplicable in a military context by this Court and federal courts throughout the country; petitioners, in short, are challenging the heart of the military non-intervention doctrine. They are asking this Court to

disregard this longstanding doctrine without an adequate legal or factual basis. Petitioners are seeking to remove the essential autonomy of the military and replace it with the rights of an individual to litigate any military personnel matter he might wish. The court below has properly and fairly upheld the military non-intervention doctrine, as repeatedly defined by this Court, and has denied petitioners' claims.

B. THE RULING OF THE COURT BELOW IS NOT IN CONFLICT WITH DECISIONS OF ANY OTHER FEDERAL COURT

1. *Bollen v. National Guard Board, 449 F. Supp. 343 (W.D. Pa. 1973) Is Not in Conflict With the Ruling of the Court Below.*

Petitioners assert that *Bollen* is a case which, when compared to the decision below, creates conflict among the federal lower courts. Petitioners' reliance on *Bollen* is misplaced.

Bollen is readily distinguished on its facts from the case at hand. In *Bollen*, a National Guard technician was employed prior to July 1955 and, therefore, entitled to retention until age 60 under ANGR 36-05. Such a technician is known as a "grandfather." The *Bollen* court concluded that a letter from the chief of the National Guard Bureau, Colonel Greenlief, created an expectancy in continued employment, and hence a constitutionally protected property interest. As the court stated:

> The specific language leading to this conclusion is found in the letter dated April 12, 1973 from Francis S. Greenlief, chief, National Guard Bureau. * * *

449 F. Supp. at 350. The Greenlief letter issued in *Bollen* is not applicable to any of the appellants in this case. None of these appellants are "grandfathers." Thus, the petitioners here are, as they freely admit, not within the class of persons contemplated by the Greenlief letter.

As this Court has held, National Guardsmen have no protected property interest in continued employment. *See Tennessee v. Dunlap*, 426 U.S. 312 (1976). Petitioners

were removed from the Guard under ANGR 36-06, to which the Greenlief letter has no application.

Another fact which distinguishes *Bollen* is that the *Bollen* court determined that the speech at issue was First Amendment speech. 449 F. Supp. at 350. As the record indicates here, however, the petitioners were not engaged in the exercise of First Amendment speech. (Pet., App. 3, p. 36.) The court below requested supplemental briefing on the First Amendment issue and made correct findings supported by a long line of cases that petitioners were not engaged in "whistleblowing." On the contrary, the court was convinced by overwhelming evidence that the technicians were acting within the scope of their public authority and assigned duties.

The court below fairly and correctly determined that appellants' exercise of their military authority, even though accomplished through the use of words, did not constitute "whistleblowing" protected by the First Amendment. The decision by the court below on the issue follows an unbroken line of authority.

It should also be noted that appellants' First Amendment speech theory, if taken to its logical end would result in near paralysis of the military in a mire of personnel litigation. The military decision-making process would be irreparably impaired if all personnel decisions were subject to constitutional challenges in the courts. *See McAdams v. Madagorda Co. Appraisal Dist.*, 798 F.2d 842, 848 (5th Cir. 1986).

2. *The Prior Court of Claims Ruling in the Instant Controversy Is Not in Conflict With the Decision of the Court Below.*

Petitioners also assert that the decision of the court below is in conflict with the Court of Claims ruling previously produced in the instant controversy. (Pet., App. 6.) The United States Claims Court has jurisdiction under 28 U.S.C. § 1491 to review decisions of the Board for Correction of Military Records. Petitioners argue that, because the Court of Claims would not accept appellants' claim on

the basis of lack of jurisdiction, the Board of Correction of Military Records (AFBCMR) would have no jurisdiction either. What the Court of Claims actually said was that the petitioners had no basis for recovery of monetary damages against the United States for the loss of military positions in the National Guard.

The determination of the court below that the AFBCMR could provide some relief is not in conflict with this Court of Claims ruling denying monetary recovery. As the court below properly found, the AFBCMR could provide significant relief to petitioners. The court relied heavily on *Penagaricano v. Llenza*, 747 F.2d 55 (1st Cir. 1984) which found that the AFBCMR can offer "significant relief, although the AFBCMR has no power to force a state to reinstate the officer in the state Air National Guard." *Id.* at 57. In *Penagaricano*, the First Circuit determined that if the AFBCMR determined that an officer's nonretention in the Air National Guard was a consequence of error and injustice, that Board could correct the officer's federal records to show that federal recognition had not been withdrawn and reinstate the guardsman in a comparable active federal reserve status, restore pay, and order compensatory back pay.

Petitioners are asking the Court to disregard the powers of the AFBCMR under 10 U.S.C. § 1552 to grant significant partial relief and accept certiorari based on supposed conflict even though petitioners never sought review before AFBCMR.[1] The Court of Claims decided only that a military member of the Air National Guard would have no basis for recovery of monetary damages against the United States in these circumstances, not that all relief was precluded. Petitioners are asking the Court to take a quantum leap and find a conflict where none exists.

3. *Sebra v. Neville, 801 F.2d 1135 (9th Cir. 1986) Does Not Support a Finding of Conflict Among the Lower Courts.*

---

[1] The State respondents argued repeatedly at the lower courts that petitioners failed to exhaust administrative remedies for their failure to seek relief before AFBCMR.

Finally, with regard to the Ninth Circuit's ruling in *Sebra*, petitioners represent to the Court that the Ninth Circuit had stated in *Sebra* that military decisions made for nonmilitary reasons *are* subject to court review. (*See* Pet., p. 22.) What the *Sebra* court actually observed in dictum, was that:

> 'Military' decisions made for nonmilitary reasons, and involving no application of military expertise *may* be outside the boundaries of the doctrine of unreviewability; *Renicker v. Mark*, 640 F. Supp. 244 (N.D. Ohio 1986) (same). *But see Covington v. Anderson*, 487 F.2d 660, 664 (9th Cir. 1973) (as an essential reserve component of the U.S. Military, the National Guard is subject to the traditional rule against review of military decisions).

Sebra v. Neville, 801 F.2d at 1140 (emphasis added).

As is evident from this excerpt, the *Sebra* court never held that military decisions made for nonmilitary reasons *are* subject to court review. Rather, the *Sebra* court held that under the facts before it, the traditional view of restricting review of military decision-making was appropriate; it thus adopted and applied the military non-intervention doctrine which the court below followed here and which the petitioners seek to overturn.

4. *Contrary to Petitioners' Assertions, the Integrity of the National Guard Technician Program Is Not at Risk.*

Petitioners assert that significant issues meriting review, are here involved because the decision below will have an adverse impact on the integrity of the technician's program. Petitioners assert that because their continued employment could hinge upon the supposedly arbitrary decisions of an adjutant general, the results could be rampant abuse by adjutants general and anxiety on the part of technicians rendering them unable to perform their duties properly. Petitioners' argument is beyond the bounds of plausibility.

It is just as likely that federal technicians, knowing that their continued employment is in part based upon

their ability to maintain a harmonious relationship with the state military, will take measures to coordinate their actions with National Guard personnel resulting in a more productive and efficient military.

But in any event, there is no need for the Court to engage in this sort of speculation. Through the National Guard Bureau, the military branch itself can ascertain and evaluate whether the decision below has any undesirable effects on the behavior of state adjutants general and federal technicians; it can then take whatever corrective action it might deem proper. In short, there is no need for judicial intervention and second-guessing. Instead of providing a reason for judicial intervention, the concerns of the petitioners do just the opposite.

CONCLUSION

The ruling by two courts, upon reviewing the record, that petitioners failed to create a genuine issue of fact on a proper Rule 56 motion does not present an important question of federal law unsettled by this Court, or one in conflict with applicable decisions of this Court, or a case otherwise calling for the supervision of the Supreme Court of the United States. The doctrine of military non-intervention should not be disturbed by accepting certiorari of this insignificant case. The petition should be denied.

DATED: May ____, 1989.

Respectfully submitted,

KENNETH O. EIKENBERRY
Attorney General

JAMES M. JOHNSON
Sr. Assistant Attorney General

JOHN J. RYAN
Assistant Attorney General

Highways-Licenses Building
Seventh Floor
Olympia, Washington 98504
(206) 753-6213

Attorneys for Respondents